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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 1222

GEORGIA WIGGINS, DONALD MARTIN COOPER, LEWIS CHERRY, ERVIN CHERRY, GOLDEN FRINKS, JAMES SPELLER, J. ALFRED CHERRY, CLIFTON JORDAN, DAVID BOND, HARVEY RANDOLPH SPELLER, JR., GEORGE L. ROUNTREE, TIM HAYES JORDAN, and NATHANIEL LEE, JR.,

Petitioners,

—v.—

STATE OF NORTH CAROLINA.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

CONRAD O. PEARSON
203½ East Chapel Hill Street
Durham, North Carolina

ROMALLUS O. MURPHY
126½ East Hargett Street
Raleigh, North Carolina

THEOASEUS T. CLAYTON
109 West Market Street
Warrenton, North Carolina

J. LEVONNE CHAMBERS
405½ East Trade Street
Charlotte, North Carolina

Attorneys for Petitioners

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No. .....

GEORGIA WIGGINS, DONALD MARTIN COOPER, LEWIS CHERRY, ERVIN CHERRY, GOLDEN FRINKS, JAMES SPELLER, J. ALFRED CHERRY, CLIFTON JORDAN, DAVID BOND, HARVEY RANDOLPH SPELLER, JR., GEORGE L. ROUNTREE, TIM HAYES JORDAN, and NATHANIEL LEE, JR.,

Petitioners,

—v.—

STATE OF NORTH CAROLINA.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

Petitioners pray that a writ of certiorari issue to review the judgment of the Supreme Court of North Carolina entered in this case on December 13, 1967.

Opinion Below

The opinion of the Supreme Court of North Carolina is reported at 158 S.E.2d 37 and is set forth in the appendix, *infra*, pp. 1a-18a.

Jurisdiction

The judgment of the Supreme Court of North Carolina was entered on December 13, 1967. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(3), petitioners having asserted below and asserting here depriva-

tion of rights secured by the Constitution and statutes of the United States.

Question Presented

Were petitioners denied their rights under the due process clause of the Fourteenth Amendment when testimony was given at their trial against them by the sheriff of the county who had handpicked the panel from which the jury that tried and convicted them was chosen?

Statement

On September 13, 1966, petitioner Golden Frinks drove to the site of Southwestern High School with approximately 20 other persons, most of whom were students (R. 92). Southwestern High School is a Negro high school located in Bertie County, North Carolina (R. 91). The petitioners wished to demonstrate in protest of certain restrictive policies adopted by the school preventing their wearing of "freedom buttons." Upon their arrival at the high school at about 8:30 a.m., they took up signs and began peacefully picketing at the side of the road in front of the high school. The evidence did not indicate that at any time were they on school property, but rather were in a ditch that divided the highway from the school. The picketers were orderly and nonviolent at all times and did not say anything during the course of their picketing (R. 93).

The sheriff of Bertie County saw the cars with the demonstrators heading towards the high school and he followed them there. After speaking to the demonstrators, the sheriff spoke to the principal and called two deputies to come to the high school. When the deputies arrived

all 20 of the demonstrators demonstrating at that time were arrested (R. 103).

Twelve of the demonstrators were charged with violating General Statutes of North Carolina, §14-273, which makes it a misdemeanor to "wilfully interrupt or disturb any public or private school . . . either within or without the place where such . . . school is held." Petitioner, Golden Frinks, was charged with aiding and abetting the others with violating the statute (R. 10). All 13 petitioners were tried together and their convictions were affirmed in a single opinion of the North Carolina Supreme Court (158 S.E.2d 37, App. 1a).[1]

Prior to trial the petitioners challenged the composition of the jury panels in Bertie County on the grounds that Negroes had been systematically excluded therefrom. After a hearing on that issue, the trial judge agreed that such systematic exclusion had taken place (R. 31-33). However, instead of ordering a recomposition of the entire jury list and panels, he simply ordered the sheriff to pick 50 citizens known to him as persons of good character to form a new panel for the purpose of trying petitioners' case (R. 32-33). The sheriff testified that he used the telephone directory and his own memory to select names that "I knew were good, outstanding citizens of Bertie County" (R. 90). From the 50 persons, a jury of six whites and six Negroes were picked (R. 33).

At trial the sheriff was one of the three witnesses who testified for the prosecution. The other two witnesses were the principal of the high school and one of the teachers there, who, of course, were involved in the dispute with petitioners over conditions and practices at the school. Thus, the sheriff was the only wholly disinterested wit-

[1] The cases of the rest of the demonstrators were evidently handled by the local juvenile court and are not involved in the present petition.

ness that testified before the jury. His testimony was particularly important with regard to the conviction of petitioner Frinks for aiding and abetting the other defendants. The sheriff testified that, before the picketing began, he had informed Frinks that there was a statute that prohibited disturbing a public school, and that Frinks had respondent to the effect that he didn't care (R. 102, 105).

The jury returned a verdict of guilty and the defendants were fined from $10.00 to $50.00 and ordered to pay costs. Petitioner Golden Frinks was sentenced to 60 days in the county jail (R. 119-20). The convictions were appealed to the Supreme Court of North Carolina, which affirmed them on December 13, 1967. A stay of execution of the judgment was granted pending the filing and disposition of this petition.

How the Federal Question Was Raised and Decided Below

Petitioners challenged the composition of the jury, the process of its selection and the sheriff's testifying to a jury which he had selected himself. Petitioners objected to the composition of the jury by a motion to challenge the jury array (R. 31). After the court had ordered the dismissal of the original panel and ordered the sheriff to select 50 jurors himself, a further objection to this procedure was made and overruled by the trial court (R. 33, 87-90). The issue of the denial of due process under the federal Constitution because the sheriff was a key prosecution witness before a jury which he himself had selected was raised by an assignment of error on appeal (R. 135-37),[2] was argued to the Supreme Court of North Carolina, and was rejected by it (App. 13a; 158 S.E.2d at 45).

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[2] The text of the assignment of error is as follows:

This ASSIGNMENT OF ERROR is addressed, (1) to the total denial by the Trial Court of defendants' rights to be tried by a jury sys-

REASONS FOR GRANTING THE WRIT

The Decision of the North Carolina Supreme Court in Holding That It Was Not a Denial of Due Process for the Petitioners to Be Convicted by a Jury When the Sheriff Who Selected It Appeared as a Witness Conflicts With the Opinion of This Court in *Turner* v. *Louisiana*.

In the trial court below petitioners challenged the jury array on the ground that Negroes had been systematically excluded from it, in violation of the Fourteenth Amendment to the Constitution. The trial court dismissed the challenged array and rather than selecting a new panel through the jury commissioners and court clerks, ordered the sheriff to personally select 50 persons that in his opinion were of good character to be jurors.

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tem and by a jury selection process which is completely free of racial discrimination; (2) to the obviously discriminatory "cure" applied by the Trial Court to the adjudged racial discrimination in the Bertie County jury system, under which "cure" defendants are penalized in the jury selection process, solely because of their race, by being given an abbreviated, improvised and dubious jury panel of all talesmen jurors; (3) to the obviously discriminatory "cure" applied by the Trial Court to the adjudged racial discrimination by the Bertie County Commissioner in jury selection, under which "cure" defendants are further penalized solely because of their race, by the Court's leaving the selection of their panel to the subjective and uncontrolled will and discretion of an adversely interested major witness in their case, to wit, the Sheriff of Bertie County; (4) to the unconstitutional application of North Carolina General Statutes 9-11 by the Trial Court, under which application, North Carolina General Statutes 9-11 is applied as a "cure" to the adjudged unconstitutional application and administration of North Carolina General Statutes 9-1, et seq., to which the former is an inseverable adjunct. The rights above-mentioned are all protected by Article I, Sections 13, 17 and 38, of the Constitution of North Carolina and by the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the Federal Constitution. The errors above referred to are pointed up by EXCEPTIONS Nos. 8, 9, 10, 11, 12, 42 (R. pp. 87, 88, 89, 90, 120).

The trial court thus gave limited relief to petitioners' claims under the equal protection clause of the Fourteenth Amendment[3] while leaving their related due process rights to "a fair trial by a panel of impartial, 'indifferent' jurors," *Irvin* v. *Dowd*, 366 U.S. 717, 722, in the hands of the chief prosecution witness.

The sheriff testified that he selected 50 persons based on his acquaintance with them and by going through the telephone directory. Out of this handpicked group of 50 persons, 12 were selected to sit on the jury that tried and convicted petitioners. At trial the sheriff was one of three witnesses for the State. Indeed, he was the only apparently disinterested witness since the other two, the principal and a teacher at the high school, were involved in the dispute with the petitioners.

Moreover, the sheriff's testimony was of particular importance in showing intent on the part of petitioner Frinks to aid and abet in violating the statute herein involved. The sheriff stated that he had informed Frinks of the statute and Frinks had responded that he did not care that such a prohibition existed (R. 102). It must be assumed that the testimony of the sheriff had great weight in the jurors arriving at a verdict of guilty.

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[3] It is important to note that in a rural county where the population is 60% Negro (R. 32), and where the trial court found that Negroes had been systematically excluded from the jury array, that no reform of the selection system resulted. While petitioners, as defendants in a criminal action, might not have standing, as such, to seek structural reform, cf., *Mitchel* v. *Johnson*, 250 F. Supp. 117 (M.D. Ala. 1966), we contend that the resulting process of selection should be given careful scrutiny by this Court. The reasonable inference of discrimination resulting from the finding of Negro exclusion is not rectified by the kind of procedure complained of herein. For this Court to require that the procedure be reformed where it has been determined that Negroes have been systematically excluded from the juries would not only ensure a fair jury for the defendants here, but would also give some assurance that Negroes will no longer be so excluded in that jurisdiction.

However, the fact that the sheriff had picked the jurors from his personal acquaintance with them could only serve to increase his influence over them beyond that enjoyed by an ordinary witness. Thus, this case is closely analogous to *Turner* v. *Louisiana,* 379 U.S. 466. In that case the two principal witnesses for the prosecution were deputy sheriffs. The jurors were sequestered in accordance with Louisiana law during the trial and were placed in charge of the sheriff. As this Court said, "in practice, this meant that the jurors were continuously in the company of [the] deputy sheriffs," 379 U.S. at 468. This Court reversed the convictions on the ground that the right to a jury trial guarantees to the criminally accused "a fair trial by a panel of impartial, 'indifferent' jurors," 379 U.S. at 471. An impartial jury could not be assured where witnesses for the prosecution have acquired an influence over them through their official capacity.

Similarly here the jurors could not but have been influenced inordinately by the testimony of the very man who had selected them to serve as jurors. Due process demands no less than that defendants in a criminal trial, if the state chooses to try them before a jury, be put on an equal basis with the prosecution and that the jury be free of any possible bias towards the prosecution because of a close relationship between them and witnesses of the prosecution who are acting in their official capacity. Petitioners urge that certiorari should be granted to resolve the important question of whether a procedure such as adopted here can stand consistent with the rule in *Turner.*

CONCLUSION

For the above reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

CONRAD O. PEARSON
203½ East Chapel Hill Street
Durham, North Carolina

ROMALLUS O. MURPHY
126½ East Hargett Street
Raleigh, North Carolina

THEOASEUS T. CLAYTON
109 West Market Street
Warrenton, North Carolina

J. LEVONNE CHAMBERS
405½ East Trade Street
Charlotte, North Carolina
Attorneys for Petitioners

APPENDIX

Decision of the Supreme Court of North Carolina

NORTH CAROLINA SUPREME COURT

Fall Term 1967

No. 1745 Bertie

State of North Carolina

APPENDIX

George Winston, Jr., Allen Marvin Coopers, Lewis Garnett, Davis Pinnix, Gaither James, Jarod Sessoms, J. M. Reed Carver, Clarence Jordan, Hayes Roberts, Harvey Randolph Sessoms, Jr., Clarence L. Rountree, Ira Harris Jones, Nathaniel Lee, Jr.

Appeal by defendants from Valentine, J., at the February 1967 Session of Bertie.

The defendants were tried on separate warrants, which were consolidated for trial. The warrants, as to all the defendants except Fields, charged that on or about 14 September 1966 the defendant named therein "did knowingly, wilfully and unlawfully interrupt and disturb the Southwestern High School, a public school in Bertie County, N. C., by loitering in front of the Southwestern High School, which plowing interfered with classes of the school in violation of G.S. 14-273." The warrant against Fields charged him with aiding and abetting in such interference and disturbance of the school.

Prior to pleading to the warrants, the defendants moved to quash each warrant on the ground that it shows upon its

APPENDIX

Decision of the Supreme Court of North Carolina

NORTH CAROLINA SUPREME COURT

FALL TERM 1967

No. 174—Bertie

STATE OF NORTH CAROLINA

v.

GEORGIA WIGGINS, DONALD MARTIN COOPER, LEWIS CHERRY, ERVIN CHERRY, GOLDEN FRINKS, JAMES SPELLER, J. ALFRED CHERRY, CLIFTON JORDAN, DAVID BOND, HARVEY RANDOLPH SPELLER, JR., GEORGE L. ROUNTREE, TIM HAYES JORDAN, NATHANIEL LEE, JR.

Appeal by defendants from Fountain, J., at the 6 February 1967 Session of Bertie.

The defendants were tried on separate warrants, which were consolidated for trial. The warrants, as to all of the defendants except Frinks, charged that on or about 13 September 1966 the defendant named therein "did knowingly, wilfully and unlawfully interrupt and disturb the Southwestern High School, a public school in Bertie County, N. C., by picketing in front of the Southwestern High School," which picketing interfered with classes at the school in violation of G.S. 14-273. The warrant against Frinks charged him with aiding and abetting in such interruption and disturbance of the school.

Prior to pleading to the warrants, the defendants moved to quash each warrant on the ground that it shows upon its

face that the defendant named therein was "in the peaceful and orderly exercise of First Amendment rights of picketing and * * * of freedom of speech and protest," and on the further ground that G.S. 14-273 is unconstitutional, as applied to the alleged conduct of the defendants, "by reason of the obvious collision between the statute and the rights of peacefully picketing." The motion to quash was overruled as to each defendant.

Prior to pleading to the warrants, the defendants challenged the array of jurors summoned for that session of the superior court, the ground of the challenge being that Negroes had been systematically excluded from the jury list, and so from the jury box, from which the panel in question was drawn. All of the defendants are Negroes. The court conducted a hearing upon this motion, at which numerous witnesses, including county officials and others, were called by the defendants and examined. The presiding judge thereupon found as a fact that "there has been a disproportionate number of white persons to that of Negro persons whose names have been put in the jury box for the drawing of jurors" as compared with the proportion of Negro residents of the county to the total population, and as compared with the proportion of Negroes listing property for taxes with the total number of persons so doing, which disproportion he found to have been without any intention to discriminate on account of race in the selection of names to be placed in the jury box. The trial judge then ordered that "to assure each defendant that he and she will be tried by jurors who are selected without regard to race," no juror will be called into the box for the trial of these cases from the regular panel, but the sheriff would summon "fifty persons who are qualified to serve as jurors * * * without regard to race."

The sheriff so summoned a special venire and from it the trial jury was selected, six of its members being Negroes and six being white persons.

Thereupon, prior to entering their pleas to the warrants, the defendants objected to the special venire on the ground that they were entitled to be tried by jurors "selected by the Constitutional system that is provided by the State." The sheriff was called as a witness and examined by the defendants concerning the method used by him in selecting those comprising the special venire. The objection of the defendants to the special venire was overruled.

Thereupon, the defendants entered pleas of not guilty. The jury returned a verdict of guilty as to each defendant. The defendants, other than Frinks, were fined in varying amounts. Frinks was sentenced to confinement in the county jail for a term of 60 days. Each defendant appealed.

The State called as witnesses the principal of Southwestern High School, the teacher of the class in bricklaying at the school, and the sheriff of the county. The defendants offered no evidence.

The school principal testified that on the date named in the several warrants the school was in session. It is located on Highway 308, some five miles from the Town of Windsor. Only two residences are in the vicinity of the school, the nearest being 100 yards away. The school building sits back from the highway approximately 500 feet. At the time of the alleged offense, the class in brick masonry was in progress, under the direction of its teacher, on the school grounds approximately 10 to 25 feet from the highway, the students in the class being engaged in the erection of certain brick structures as part of their class work. Other pupils were inside the building where classes were in progress. Frinks drove up to a point on the highway in front of the school, "unloaded some children and took out some

signs with various wording * * * and gave each one a sign and they began to picket"; i.e., to walk up and down the ditch separating the highway from the school campus. The school principal thereupon asked the sheriff, who was present, "if he could get those people away." Each of the defendants, other than Frinks, participated in the marching. (The principal did not name Lewis Cherry among the marchers, but he was so named by the sheriff.) This conduct by the defendants resulted in the pupils within the school building "looking and carrying on" to such an extent that the principal had "to get them back to their classes and walk up and down the hall * * * trying to keep them in class." When the principal went back into the building, he found pupils in the classes in progress in rooms facing the highway "looking out of the windows at what was going on," and pupils from classes in progress on the other side of the building corridor "running to the side that looked out on the marchers to see what was happening." These students "were talking among themselves * * * saying what they had seen." The brick masonry class, consisting of 15 or 16 students, was taken from its work on the school grounds back to the "shop" before the completion of its fully allotted class period. There was no problem in keeping order in the school except during the time "when these defendants were out in front" of the school.

The teacher of the class in bricklaying testified that he was conducting his class on the school grounds, the project in hand being the construction of some brick columns, some ten feet from the ditch in or along which the defendants, other than Frinks, marched. There were 15 students in the class. The marchers appeared some ten minutes after the class started. They arrived in an automobile, got out of it in front of the school grounds, passed out some signs and

then marched along the ditch. The teacher tried to keep his students busy but the marchers took their attention, and some of the students stopped what they were doing and watched the marchers. The teacher talked to his students but could not maintain control of the class, so he gathered up the tools and took the class back into the building two hours before they were scheduled to complete their assignment on the grounds. The marchers were not singing, clapping their hands, or doing anything except marching.

The sheriff testified that he had been at the school when it opened for the day's work, but after the school opened, he left in his automobile. Approximately four miles away he met Frinks with four or five other people in his car. The sheriff at once returned to the school. Upon his arrival there, he found Frinks' car parked on the shoulder of the highway, with several people standing around it, and Frinks handing out signs "to the students." (Apparently the marchers were students enrolled in the school but not in attendance upon classes that day.) The sheriff asked Frinks if he was aware of the statute of North Carolina forbidding the interruption of a public school. Frinks replied, "I don't care anything about what is in the Statute Books." (The court instructed the jury that the testimony of the sheriff concerning the remarks of Frinks was evidence as to Frinks only and not as to any other defendant.) The defendants, other than Frinks, together with some eight others who were "juveniles," then lined up and started marching. They were arrested after they had marched up and down two or three times. The sheriff observed several students standing and watching the demonstration and the marching. He also observed the teacher of the bricklaying class carry his class back into the "shop." After passing out the signs to the marchers and lining up the marchers,

"Frinks got in his car and drove off, headed toward Windsor." Approximately 20 minutes elapsed from the arrival of the defendants at the site of the marching to the arrest of the marchers. Frinks was arrested two days later.

The various signs carried by the marchers read as follows:

"God set us free why should we be here as slaves."

"A change is going to come."

"Freedom, Yeah, Yeah, Yeah."

"We want to talk but you make us talk and we'll talk and you will walk."

"We want to be taught a free education."

"Let us be free and taught free."

"Searching, searching for a free Southwestern."

"Southwestern will overcome some day."

"What about our buttons, Mr. Singleton? Freedom!"

"Freedom in '67."

"We want to grow up free!"

ATTORNEY GENERAL BRUTON and DEPUTY ATTORNEY GENERAL MOODY for the State.

CLAYTON & BALLANCE, J. LEVONNE CHAMBERS and MITCHELL & MURPHY for defendant appellants.

LAKE, J. The pertinent provisions of G.S. 14-273 are:

"If any person shall wilfully interrupt or disturb any public or private school * * * either within or without the place where such * * * school is held * * * he shall be guilty of a misdemeanor, and shall, upon con-

viction, be fined or imprisoned or both in the discretion of the court."

The defendants argue in their brief that this statute is void because its prohibitions are uncertain, vague or indefinite, under the rule applied by this Court in State v. Furio, 267 NC 353, 148 SE 2d 275. They argue in their brief that the statute contains no definition of "interrupt" or of "disturb" and, consequently, men of common intelligence must necessarily guess at its meaning and thus be left in doubt as to what conduct is prohibited. It is difficult to believe that the defendants are as mystified as to the meaning of these ordinary English words as to they profess to be in their brief. Clearly, they have grossly underestimated the powers of comprehension possessed by "men of common intelligence." Nevertheless, we treat this contention as having been seriously made.

It is elementary that in the construction of a statute words are to be given their plain and ordinary meaning unless the context, or the history of the statute, requires otherwise. Cab Co. v. Charlotte, 234 NC 572, 68 SE 2d 433; In re Nissen's Estate, 345 F 2d 230. While the meaning of "interrupt" and of "disturb" is perhaps more easily understood than defined with precision, resort to Webster's Dictionary reveals that "interrupt" means "to break the uniformity or continuity of; to break in upon an action," and "disturb" means "to throw into disorder." For those who are unhappy without citation to authorities of the type customarily cited in judicial opinions, we refer to Black's Law Dictionary and to Watkins v. Manufacturing Co., 131 NC 536, 42 SE 983, where this Court said that an allegation in a complaint for personal injury that the plaintiff had been "disturbed in body" must be understood to mean

that "her body was thrown into a state of disorder, and thereby injured."

In Kovacs v. Cooper, 336 US 77, 69 S. Ct. 448, 93 L. Ed. 513, the Supreme Court of the United States, speaking through Mr. Justice Reed, in sustaining a conviction in the courts of the State of New Jersey for violation of an ordinance forbidding the use of sound trucks emitting "loud and raucous" sound, said:

> "The contention that the section is so vague, obscure and indefinite as to be unenforceable merits only a passing reference. This objection centers around the use of the words 'loud and raucous.' While these are abstract words, they have through daily use acquired a content that conveys to any interested person a sufficiently accurate concept of what is forbidden."

When the words "interrupt" and "disturb" are used in conjunction with the word "school," they mean to a person of ordinary intelligence a substantial interference with, disruption of and confusion of the operation of the school in its program of instruction and training of students there enrolled. We found no difficulty in applying this statute, in accordance with this construction, to the activities of a group of white defendants in State v. Guthrie, 265 NC 659, 144 SE 2d 891. Obviously, the statute applies in the same manner regardless of the race of the defendant. In State v. Ramsay, 78 NC 448, in affirming a conviction for the similar offense of disturbing public worship, this Court speaking through Smith, C.J., said:

> "It is not open to dispute whether the acts of the defendant were a disturbance in the sense that subjects him to a criminal prosecution, and that the jury was warranted in so finding, when they had the ad-

mitted effect of breaking up the congregation and frustrating altogether the purposes for which it had convened."

Giving the words of G.S. 14-273 their plain and ordinary meaning, it is apparent that the elements of the offense punishable under this statute are: (1) Some act or course of conduct by the defendant, within or without the school; (2) an actual, material interference with, frustration of or confusion in, part or all of the program of a public or private school for the instruction or training of students enrolled therein and in attendance thereon, resulting from such act or conduct; and (3) the purpose or intent on the part of the defendant that his act or conduct have that effect. One, who has reached the age of responsibility for his acts and who is not shown to be under disability of mind, is presumed to intend the natural and normal consequences of his acts and conduct. State v. Ramsay, supra. Nothing else appearing, the defendant's motive for doing wilfully an act forbidden by statute is no defense to the charge of violation of such statute. Cox v. Louisiana, 379 US 559, 85 S. Ct. 476, 13 L. Ed. 2d 487; Commonwealth v. Anderson, 272 Mass. 100, 172 NE 114, 69 ALR 1097; 21 Am Jur 2d, Criminal Law, § 85.

Each warrant in the present case charges the defendant named therein in plain and precise language with each element of this statutory offense at the specified time and place by the specified conduct of picketing in front of the school, which picketing interfered with classes at the school. Each warrant is sufficiently specific to protect the defendant named therein from being placed again in jeopardy for the same offense. Consequently, the motion to quash the warrants was properly overruled unless the defendants had,

as they contend they did have, a lawful right to engage in the specified conduct, notwithstanding the statute.

The uncontradicted evidence of the State, if true, as it must be deemed to be in passing upon a motion for judgment of non-suit, is sufficient to show that the defendants, other than Frinks, intentionally paraded back and forth in front of the specified public school building and grounds in the immediate vicinity of a class then in progress on the school grounds. The evidence likewise shows that Frinks intentionally aided, abetted, directed and counseled the marching. The marchers carried placards or signs. These signs were utterly meaningless except on the assumption that they related to some controversy between the defendants and the administration of the school, specifically Principal Singleton. Presumably, they were deemed by the defendants sufficient to convey some idea to students or teachers in the school. The site was the edge of a rural road running in front of the school grounds, with only two residences in the vicinity. There is nothing to indicate that the marchers intended or desired to communicate any idea whatsoever to travelers along the highway, or to any person other than students and teachers in the Southwestern High School. As a direct result of their activities, the work of the class in bricklaying was terminated because the teacher could not retain the attention of his students, and disorder was created in the classrooms and hallways of the school building itself. Consequently, the motion for nonsuit was properly overruled unless the defendants had, as they contend, the lawful right so to interrupt and disturb this public school, notwithstanding the provisions of the statute.

The contention of the defendants that the court committed error in admitting evidence as to the conduct of

the students in the bricklaying class and in the school building in response to the marching of the defendants must be deemed frivolous. An essential element of the offense charged in the warrants is the actual interruption and disturbance of the program of the school. Obviously, this can be shown only by evidence of the effect of the defendants' conduct upon the activities of the teachers and students of the school. The witnesses, who testified concerning this, related their own observations of what happened upon the school grounds and within the school building while the conduct of the defendants was in progress, as contrasted with the good order which prevailed prior to the commencement of the marching and after the departure of the defendants. Such evidence was clearly material and competent.

When the defendants challenged the array of regular jurors summoned for the term, on the ground of unconstitutional discrimination against members of their race in the selection of names to go into the jury box from which the panel was drawn, the trial judge conducted a hearing and heard all of their evidence upon that matter. Upon this evidence, he found that a disproportionately small number of names of Negroes had been included in the box. He theerupon ordered that no member of the regular jury panel be called as a juror for the trial of these cases and directed the sheriff to summon a special venire of fifty persons "without regard to race." This was done and from that panel the jury which tried and convicted the defendants was chosen, six of those jurors being Negroes. The contention of the defendants that it was error to order such special venire is without merit. The procedure so followed by the trial judge is expressly authorized by G.S. 9-11, and the only contention of the defendants that tales

jurors can be called only to supplement an insufficient number of regular jurors is refuted by the very case they cite in their own brief, State v. Manship, 174 NC 798, 94 SE 2, in which this Court, speaking through Clark, C.J., said:

> "It has never been controverted that the judge in his discretion has the power to excuse any juror and to discharge any jury that he thinks proper. It seems that in this case the regular jury had been discharged under the impression that the business of the court was over. This case coming up, the defendant asked for a continuance. But, there being no other ground suggested therefor, the court, in the exercise of its discretion, directed tales jurors to be summoned, under the above statute [G.S. 9-11], which was passed for this very purpose, that 'there may not be a defect of jurors.' There was long a practice, under the former statute, that the judge should reserve one juror of the regular panel to 'build to,' based upon the technical idea that the tales jurors should be *other* jurors, as if they would not be 'other' jurors even if that one juror had also been discharged. It was no prejudice to this defendant that one regular juror was not retained. Twelve jurors, freeholders, to whom he entered no exception, sat upon his case, a[illegible]' he was duly convicted."

There is nothing in this record to indicate that any juror who sat upon the case and convicted the defendants was challenged by any of the defendants. The record does show that the defendant Wiggins, having exhausted her peremptory challenges, attempted to challeng peremptorily a seventh juror and her challenge to that juror was disallowed. However the record shows that the juror so chal-

lenged by her was removed from the jury upon the peremptory challenge of another defendant.

The record does not indicate that any other case was tried at this term of court or that any regular juror, or any other juror drawn from the jury box, participated in any way whatever in any proceeding before the court at this term or at any other term. The objection of these defendants to trial by jurors drawn from the jury box having been sustained, and they having been tried by a jury summoned and selected pursuant to the statute, and without discrimination on account of race or otherwise, the defendants may not attack the judgment entered against them because of a defect in the composition of the jury box from which the regular panel was drawn.

We have no information as to what action has or has not been taken with reference to the jury box since the trial of these cases, and that question is not now before us.

The special venire was not rendered invalid by reason of the fact that the sheriff who summoned it, pursuant to the orders of the court, was a witness for the State in these cases. State v. Yoes, 271 NC 616, 157 SE 2d 386; Noonan v. State, 117 Neb. 520, 221 NW 434, 60 ALR 1118; 31 AM JUR, Jury § 108; Anderson on Sheriffs, § 280.

We are, therefore, brought to the principal contention of the defendants, which, in effect, is that they had a lawful right wilfully to interrupt and disturb the operation of this public school for the reason that they were carrying signs bearing the above quoted words thereon, and the purpose of their marching was to convey to someone (obviously, students or teachers in the school) some idea. That is, the defendants assert that the Constitution of this State, Article I, § 17, and the Fourteenth Amendment to the Constitution of the United States, permit them, with im-

munity from prosecution, to disrupt the operation of a public school so long as the means used by them for that purpose is marching back and forth in front of the school while carrying banners and placards on which words appear.

Freedom of speech and protest against the administration of public affairs, including public schools, is a fundamental right which has been cherished in this State since long before the adoption of the Fourteenth Amendment to the United States Constitution. It has, however, never been doubted that this is not an absolute freedom or that the State, in the protection of the freedom of others and of its own paramount interests, such as its interest in the educaion of its children, may impose reasonable restraints of time and place upon the exercise of both speech and movement. Thus, in State v. Ramsay, supra, a former member of a religious congregation, who had been expelled therefrom for reasons or pursuant to a procedure which he deemed insufficient and unjust, was convicted and punished for disturbing public worship when he persisted in breaking into a worship service of the church and reargueing the supposed merits of his case. Neither the enactment of G.S. 14-273 nor its enforcement against these defendants in this case violated the Law of the Land Clause of Article I, § 17, of the Constitution of North Carolina.

The Fourteenth Amendment to the Constitution of the United States grants to the defendants no license wilfully to disturb the operation of a public or private school in this State.

G.S. 14-273 is not discriminatory upon its face. It is universal in its application. Anyone who does that which is prohibited by the statute is subject to its penalty. It does not confer upon an administrative official the author-

ity to issue, in his discretion, permits to disturb public schools and, therefore, does not invite or permit that type of administrative discrimination against the disseminators of unpopular ideas which was condemned in Saia v. New York, 334 US 558, 68 S. Ct. 1148, 92 L. Ed. 1574.

Neither the statute nor its application in this case has the slightest relation to State approval or disapproval of the ideas expressed on the signs carried by the defendants, or of the position taken by the defendants in their controversy, whatever it may have been, with the principal of the school. Like the ordinance involved in Kovacs v. Cooper, supra, this statute does not undertake censorship of speech or protest. As the Court said in the Kovacs case: "City streets are recognized as a normal place for the exchange of ideas by speech or paper. But this does not mean the freedom is beyond all control." Again in Schneider v. State, 308 US 147, 60 S. Ct. 146, 84 L. Ed. 155, the Court, recognizing the authority of a municipality, as trustee for the public, to keep its streets open and available for the movement of people and property, said, by way of illustration, a person could not exercise his liberty of speech "by taking his stand in the middle of a crowded street, contrary to traffic regulations, and maintain his position to the stoppage of all traffic * * *" G.S. 14-273 does not have "the objectionable quality of vagueness and overbreadth" thought by the United States Supreme Court to render void the Virginia statute under examination in NAACP v. Button, 371 US 415, 83 S. Ct. 328, 9 L. Ed. 2d 405. G.S. 14-273 is not "susceptible of sweeping and improper application" so as to prevent the advocacy of unpopular ideas and criticisms of public schools or public officials.

Unquestionably, "the hours and place of public discussion can be controlled" by the State in the protection of

its legitimate and vital public interest in the efficient operation of schools, public or private. See Saia v. New York, supra; Kovacs v. Cooper, supra. The classic statement by Mr. Justice Holmes in Schenck v. United States, 249 US 47, 39 S. Ct. 247, 63 L. Ed. 470, "The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic," is still regarded by the Supreme Court of the United States as a correct interpretation of the First Amendment. The education of children in schools, public or private, is a matter of major importance to the State, at least as significant as the free flow of traffic upon a city street.

In Cox v. Louisiana, supra, the Court recognized that picketing and parading are subject to state regulation, even though intertwined with expression and association. There, the Court, quoting from Giboney v. Empire Storage & Ice Co., 336 US 490, 69 S. Ct. 684, 93 L. Ed. 834, said, "[I]t has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written or printed." Accordingly, the Court there held valid on its face a state statute prohibiting picketing and parading in or near a building housing a state court, with the intent of obstructing or impeding the administration of justice. The Court said, "Placards used as an essential and inseparable part of a grave offense against an important public law cannot immunize that unlawful conduct from State control." It deemed "irrelevant" the fact that "by their lights," the marchers in that case were seeking justice. Similarly, it is irrelevant here that the defendants may have been "by their lights" seeking the improvement of the educational processes at Southwestern High School.

Whatever their motives, the result of their wilful activities was the disruption of those processes at that school. That is what the statute forbids and, in so doing, it does not violate limitations imposed upon the State by the First Amendment to the Constitution of the United States, now deemed by the Supreme Court of the United States to be made applicable to the states by the Fourteenth Amendment.

It is also irrelevant that the defendants marched silently, were not on the school grounds, and neither threatened nor provoked violence. Their actions can admit of no interpretation other than that they were planned and carried out for the sole purpose of attracting and holding the attention of students or teachers in the Southwestern High School at a time when the program of the school required those students and teachers to be engaged in its instructional and training activities. There can also be no doubt that they succeeded in this purpose. The uncontradicted evidence as to the defendant Frinks is that, before the marching began, this statute was called to his attention and explained to him in substance, to which he replied, "I don't care anything about what is in the Statute Books." In the light of the uncontradicted evidence, the sentences imposed by the presiding judge were lenient.

As the Supreme Court of the United States said in Cox v. Louisiana, supra, "There is a proper time and place for even the most peaceful protest and a plain duty and responsibility on the part of all citizens to obey all valid laws and regulations." The defendants wilfully ignored this elementary principle of sound government under the Constitution of our country.

We have carefully examined each assignment of error and the authorities cited by the defendants in their brief.

We find nothing in the statute, or in the proceedings in the court below, which entitles the defendants to a new trial or to the reversal or arrest of the judgments of the court below.

No Error.

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Supreme Court of the United States

October Term, 1967

No. 1222

GEORGIA WIGGINS, DONALD MARTIN COOPER, LEWIS CHERRY, ERVIN CHERRY, GOLDEN FRINKS, JAMES SPELLER, J. ALFRED CHERRY, CLIFTON JORDAN, DAVID BOND, HARVEY RANDOLPH SPELLER, JR., GEORGE L. ROUNTREE, TIM HAYES JORDAN, and NATHANIEL LEE, JR.,

Petitioners,

v.

STATE OF NORTH CAROLINA,

Respondent.

BRIEF OF RESPONDENT, STATE OF NORTH CAROLINA, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

T. W. BRUTON
Attorney General of North Carolina

RALPH MOODY
Deputy Attorney General

Justice Building
Raleigh, North Carolina

Counsel for the State of North Carolina,
Respondent.

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Opinion Below

The Opinion of the Supreme Court of North Carolina is reported at 272 N. C. 147 (No. 2 Advance Sheets of Supreme Court of North Carolina—Issued December 27, 1967); 158 S.E. 2d 37. The Opinion is printed in the Appendix to the Petitioners' brief, pp. la - 18a.

Jurisdiction

The Petitioners attempt to invoke the jurisdiction of this Court pursuant to 28 USC 1257(3).

Questions Presented

The Respondent, State of North Carolina, submits the following as the questions presented in this case:

(1) Did the Petitioners properly raise and present to the Supreme Court of North Carolina the alleged constitutional questions which they are requesting this Court to pass upon?

(2) Assuming that Petitioners properly raised and presented to the Supreme Court of North Carolina the constitutional question here asserted before this Court: Were Petitioners denied any rights under the Due Process Clause of the Fourteenth Amendment because the Sheriff testified at the trial of Petitioners as a witness for the State?

Statement of the Case

The Petitioners, other than the Petitioner, Golden Frinks, were indicted for willfully and unlawfully interrupting and disturbing the Southwestern High School in Bertie County, North Carolina. The Petitioner, Golden Frinks, was charged with willfully and unlawfully aiding and abetting in interrupting and disturbing the same High School. The Petitioners were all tried at the February 6, 1967, Term, of the Superior Court of Bertie County and were all convicted by the jury. The Trial Court rendered judgment that all the Petitioners pay fines except the Petitioner, Golden Frinks, and he received a jail sentence of 60 days (R. 120). The fines ranged from $10.00 and the costs in some cases to $50.00 and the costs in others. The Petitioners all appealed to the Supreme Court of North Carolina, which Court affirmed the judgment below as will be seen from the Opinion of the Supreme Court of North Carolina attached as an Appendix to the Petitioners' brief.

The property of the Southwestern High School, a public school of the State system, has 400 to 500 feet frontage on Highway 308. On September 13, 1966, a class in Masonry consisting of 16 pupils was in progress at the entrance of the driveway into the school property. The class was engaged in building brick columns at this entrance which was some 10 to 25 feet from the highway. About 8:30 A.M. the Petitioner, Frinks, drove up in an automobile in front of other automobiles; he had several people with him in his automo-

bile. All of these persons got out of the cars near the school property and on the shoulder of the highway and the Petitioner, Frinks, handed out some signs to some twenty people who had come there at that time, there being eleven signs in all. These signs were introduced in evidence and a statement of the writing on the signs will be found on R. 103, 104. These persons carried the signs along the ditch and those with them began to picket or walk along the ditch bank between the paved road and the paved portion of Highway 308 and the school campus. Before this picketing or marching began the Sheriff of the County came up and warned the Petitioners as to the existence of the statute dealing with the disturbance of a school and under which the Petitioners were prosecuted. The Sheriff asked the Petitioner, Frinks, if he knew that there was a statute forbidding the interrupting of a public school. The Petitioner, Frinks, replied: "I don't care anything about what is in the statute books." (R. 102) After the school session began, these Petitioners started to march in front of the school property with the exception of the Petitioner, Frinks, who stayed about ten minutes and then went to a nearby house to observe the proceedings. This marching or picketing continued for about twenty minutes, and during this time the students, who had been brought by the teacher to a point near the road to construct brick columns, had their attention diverted from the work assigned to them and some of them laid down their tools and equipment to observe the Petitioners. The pupils were told by the teacher to continue their work and they failed to do so because of the Petitioners and the signs carried by them. The teacher found it necessary to abandon the Masonry class and to take the students back to their workshop.

Inside the school building there were some classrooms which faced the highway, and the pupils in these classrooms left their seats and went to the windows where they watched the proceedings of the Petitioners, and those pupils whose classrooms were on the far side of the building from the highway left their classrooms and went into the hall so they could see what was going on. It became necessary for the

Principal of the school to go into the building and halls and order the pupils to return to their classrooms and to direct those at the windows to take their seats and go on with their class work. This disturbance and interruption of the normal course of classes went on for ten to fifteen minutes (see evidence of Sheriff Daniels, R. 102), and evidence of J. S. Singleton, Principal of the school, R. 91; and see evidence of Grover C. Holmes, Masonry teacher, R. 98).

Constitutional and Statutory Provisions Involved

The Petitioners were convicted under Sec. 14-273 of the General Statutes of North Carolina, which reads as follows:

> "If any person shall willfully interrupt or disturb any public or private school or temperance society or organization or any meeting lawfully and peacefully held for the purpose of literary and scientific improvement, or for the discussion of temperance or question of moral reform, either within or without the place where such meeting or school is held, or injure any school building, or deface any school furnture, apparatus or other school property, or property of any temperance society or organization, he shall be guilty of a misdemeanor, and shall be fined not exceeding fifty dollars or imprisonment not more than thirty days."

The statute under which the jury was organized is Sec. 9-11 of the General Statutes of North Carolina and reads as follows:

> "That there may not be a defect of jurors, the sheriff shall by order of the court summon, from day to day, of the bystanders, other jurors, being freeholders, within the county where the court is held, or the judge may, in his discretion, at the beginning of the term direct the tales jurors to be drawn from the jury box used in drawing the petit jury for the term, in the presence of the court; such tales jurors so drawn to be summoned by the sheriff and to serve on the petit jury, and on any day

the court may discharge those who have served the preceding day. The judge may, upon his own motion, or upon the request of counsel for either plaaintiff or defendant, instruct the sheriff to summon such jurors outside of the courthouse. It is a disqualification and ground of challenge to any tales juror that such juror has acted in the same court as grand, petit or tales juror within two years next preceding such term of court.'"

The Petitioners attempt to bring their case within a portion of the Fourteenth Amendment of the Constitution of the United States, which portion is as follows:

"* * * No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Summary of Argument

The State of North Carolina will argue that the method of summoning the jury was valid and according to a long-time local State procedure. The State will further argue that if there were any objection to this procedure, then a procedural statute gave the Petitioners the right to object, ask for an investigation and request the Court to have some other person select the jury panel. The State will further argue that there was no race discrimination in the jury selected, since, as shown by R. 33, six members of the trial panel were Negroes and the other six were white persons. The State will further argue that the selection of the members of the jury and their being summoned by the Sheriff was not properly excepted to and the question raised before the trial court.

The State of North Carolina will further argue that no prejudice has been shown on the part of the Petitioners adversely affecting their rights for that there is no evidence

that the Sheriff talked about the case to any of the jurors or that he took any action adversely to the Petitioners other than to testify as a witness for the State, and none of the Petitioners refuted any of his evidence. The State will, therefore, argue that there has been no violation of the Petitioners' constitutional rights in violation of the Due Process Clause.

Argument

I

DID THE PETITIONERS PROPERLY RAISE A CONSTITUTIONAL QUESTION AS TO THE SHERIFF SUMMONING THE JURORS AND ALSO TESTIFYING AS A WITNESS FOR THE STATE IN THE CASE?

It is the contention of the State of North Carolina that the Petitioners never at any time presented to the trial court the question of whether it was proper for the Sheriff to summon the panel of jurors from which the trial panel was selected. We again emphasize that the trial panel was composed of six Negroes and six white persons (R. 33). If the Petitioners had wished to raise this question they had available to them a procedural statute for this purpose. Section 9-12 of the General Statutes of North Carolina provides as follows:

> "When, in the trial of any action before a jury, the sheriff of the county in which the case is to be tried is a party to or has any interest in the action, or when the presiding judge finds upon investigation that the sheriff of the county is not a suitable person, on account of indirect interest in or relative to the cause of action, to be entrusted with the summoning of the tales jurors in any particular case pending, such judge shall appoint some suitable person to summon the jurors in place of the sheriff."

The trial judge found (R. 31) that the jury system of the

County was unconstitutionally organized and ordered the Sheriff to summon 50 persons qualified to serve on the jury (R. 32). The Sheriff carried out the order, and, as above stated, the trial panel consisted of six Negroes and six white persons. The Petitioners never at any time invoked the above-quoted statute or raised the constitutional question now presented before the trial court with a request that he pass upon the question. The Petitioners for the first time raised the question before the Supreme Court of North Carolina in an assignment of error which is quoted in a footnote to the Petitioners' brief, beginning on p. 4.

The attempt to raise the question for the first time on appeal is not approved by this Court (IRVINE v. CALIFORNIA, 347 U. S. 128, 129; 98 L. ed. 561, 567, 74 S. Ct. 381). This is also the law in North Carolina (STATE v. JONES, 242 N. C. 563, 564, 89 S. E. 2d 129, and see: EDELMAN v. CALIFORNIA, 344 U. S. 357, 358; 97 L. ed. 387; 73 S. Ct. 293).

When the Petitioners first made up their assignments of error in the Supreme Court of North Carolina they mentioned this question for the first time, as will appear on R. 136, and which is the assignment quoted in the footnote to their brief. However, if the Court will refer to where Exception No. 11 actually appears in the record (R. 90) it will be seen that nothing at all was said to the Court about the matter nor was the Court ever asked to rule on the question. On p. 89 of the record the Sheriff was examined as to his method of selecting the jury, which begins on p. 90, but the import of the conversation between counsel for Petitioners and the Court was that counsel for Petitioners did not have any evidence of any improper conduct but wished to make an inquiry.

If the Court will examine the brief of the Petitioners filed in the Supreme Court of North Carolina the Court will see that the main attack was that the jury statute was unconstitutional for vagueness, that the Petitioners had a right guaranteed by the First Amendment to picket and do the

acts complained of, and when it came to the selection of the jury the chief complaint was that the Court had no right to have the Sheriff summon a panel of jurors because the Petitioners had a right to be tried by jurors selected according to the regular system, and, therefore, this panel being unconstitutionally organized apparently Petitioners thought they could not be tried at all.

II

THE PETITIONERS WERE NOT DENIED ANY RIGHTS UNDER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT BECAUSE THE SHERIFF SELECTED THE JURY PANEL FROM WHICH THE TRIAL PANEL WAS CHOSEN AND ALSO TESTIFIED AS A WITNESS FOR THE STATE.

Section 9-11 of the General Statutes of North Carolina permitting the Court to order the Sheriff to summon other jurors when there is a defect of jurors goes back to the Year 1779. There is no evidence that the Sheriff said anything whatever about the case to any member of the panel of jurors summoned by him and from which the trial panel was selected.

In the Case of TURNER v. LOUISIANA, 379 U. S. 466, 13 L. ed. 2d 424, 85 S. Ct. 546, a deputy sheriff by the name of "Simmons" was one of the principal witnesses for the prosecution and had testified to certain damaging admissions which he said Turner had made to him at the time of his apprehension. Two deputy sheriffs "were in this close and continual association with the jurors," and it appears from the evidence in the footnote to the case that Simmons had spoken to the jury several times although he denied discussing the case. He had taken meals with the jury, sitting at the same table with them, and had ridden in automobiles with members of the jury and had had various relationships with the jury.

In the Turner Case counsel for the Petitioner, Turner,

was diligent and moved for a mistrial when each one of these two deputies testified as witnesses.

Therefore, unless it is conclusively presumed to be a violation of the Constitution because the Sheriff summoned the panel, there is no analogy between this case and the Turner Case. The Sheriff here did not associate with the trial jury or talk with them nor is there a single shred of evidence that the Sheriff said anything about the case to any member of the jury that he summoned; there is no evidence whatsoever that the Sheriff had acquired any influence over the members of the trial panel as appeared in the Turner Case. One might as well say that the whole jury system was bad because when the panel of jurors for the session of court is summoned by names drawn from the regular jury list. then such jurors are incompetent because the Sheriff summoned them.

There is not a shred of evidence in the record that any juror in the trial panel who sat upon the case and voted to convict the Petitioners was challenged by any of the Petitioners. We assume that the Petitioners examined each juror on voir dire and asked if they had discussed the case with anyone. There is no evidence that any member of the trial jury had discussed the case with anyone at all, much less the Sheriff.

Conclusion

Petitioners were convicted by a trial jury of which six members were members of their own race. There is no evidence whatsover that any of their rights were violated, and, to the contrary, there is ample evidence that they willfully disturbed a public school of the State. The Petitioners did not see fit to testify in the case or in any manner to attempt to refute any of the evidence of the State.

The State of North Carolina submits, therefore, that the Petitioners did not properly raise the question which they are now asserting before this Court, the question was not

passed upon by the trial court, and that there is no evidence of any prejudice to the Petitioners in their trial, and, therefore, there is no Federal question to be passed upon. The State of North Carolina, therefore, contends this Application for Certiorari should be dismissed.

Respectfully submitted,

T. W. BRUTON
Attorney General of North Carolina

RALPH MOODY
Deputy Attorney General

Justice Building
Raleigh, North Carolina

Counsel for the State of
North Carolina, Respondent.